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6 PLANTRONICS, INC.

7  
8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10 SAN JOSE DIVISION  
11

12 PLANTRONICS, INC., a Delaware  
corporation,

13 Plaintiff,

14 v.  
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16 AMERICAN HOME ASSURANCE  
COMPANY, a New York corporation; THE  
INSURANCE COMPANY OF THE STATE  
17 OF PENNSYLVANIA, a Pennsylvania  
corporation; ATLANTIC MUTUAL  
18 INSURANCE COMPANY, a New York  
corporation,

19 Defendants.  
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CASE NO. C07-06038 PVT

**PLAINTIFF PLANTRONICS, INC.'S REPLY  
IN SUPPORT OF MOTION TO STAY  
PROCEEDINGS**

Date: March 18, 2008

Time: 10:00 a.m.

Place: Courtroom 5

Trial Date: None Set

(Honorable Patricia V. Trumbull)

1 **I. INTRODUCTION**

2 As plaintiff, Plantronics, Inc. (“Plantronics”), pointed out in its motion to stay, in  
 3 circumstances such as those presented here, where there are questions of insurance coverage  
 4 related to underlying litigation, the insured is not required simultaneously to wage a “two-front”  
 5 war against the third-party plaintiffs and its insurance carriers. Two of the three defendants,  
 6 American Home Assurance Company and The Insurance Company of the State of Pennsylvania,  
 7 do not oppose a stay of this action. The third defendant, Atlantic Mutual Insurance Company  
 8 (“Atlantic Mutual”), acted alone in filing an opposition to Plantronics’ motion.<sup>1</sup> According to  
 9 Atlantic Mutual, the issue of coverage “is purely a question of law that does not implicate any  
 10 questions of fact in the underlying class action lawsuits.” Opp. at 1-2. It even goes as far as to  
 11 suggest that the coverage question is “not logically related to any factual issues in the underlying  
 12 action.” *Id.* at 2.

13 Atlantic Mutual is wrong. There will be litigation in the underlying actions, for example,  
 14 over the allegations that the use of Bluetooth Headsets caused noise induced hearing loss (*i.e.*,  
 15 bodily injury), which is directly related to Atlantic Mutual’s duty to defend and indemnify  
 16 Plantronics. Additionally, with respect to the issue of indemnification, Plantronics is entitled to  
 17 factual development in the underlying litigation on the issue of damages on account of bodily  
 18 injury. For these reasons, Plantronics is entitled to a stay of this action so that the duty to defend  
 19 can be determined after the allegations of the underlying litigation have been developed.

20 Atlantic Mutual has not even attempted to argue that it would suffer any prejudice from  
 21 the granting of a temporary stay of these proceedings. Plantronics’ motion should be granted and  
 22 this action stayed pending resolution of the underlying litigation.

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 27 <sup>1</sup> Similarly, Atlantic Mutual was the only defendant that moved to dismiss Plantronics’  
 28 complaint. The remaining defendants filed an answer in response to the complaint.

1 **II. ARGUMENT**

2 **A. THERE ARE QUESTIONS OF INSURANCE COVERAGE IN THIS**  
 3 **ACTION THAT ARE RELATED TO ISSUES THAT WILL BE**  
 4 **LITIGATED IN THE UNDERLYING ACTIONS**

5 In opposition to a stay, Atlantic Mutual argues that this action does not “turn on facts to  
 6 be litigated in the underlying action,” citing *Montrose Chemical Corp. v. Superior Court*, 6 Cal.  
 7 4th 287, 301-302 (1993).<sup>2</sup> It claims that its motion to dismiss establishes that the only facts  
 8 necessary to the coverage questions are the issuance and terms of the insurance policies and the  
 9 allegations contained in the underlying class action complaints. Opp. at 3. In that motion,  
 10 Atlantic Mutual pointed to a single sentence from the underlying actions that plaintiffs “do not  
 11 [presently] seek damages for physical injury which has already occurred to Class members, and  
 12 thus individualized determination as to causation related to bodily injury already suffered will  
 13 not be required.” Mot. to Dismiss at 5-7; *Schiller* Compl. ¶ 35.<sup>3</sup> Atlantic Mutual then relied on  
 14 that sentence in an attempt to escape from its agreed-upon obligations under the policy. Such  
 15 argument does not provide a basis to deny coverage under the policy, and it does not provide a  
 16 basis to defeat Plantronics’ request for a stay.

17 As set forth in Plantronics’ opposition to Atlantic Mutual’s motion to dismiss, the  
 18 Atlantic Mutual policy clearly provides coverage for the underlying actions. To begin with, to  
 19 make its arguments, Atlantic Mutual is forced to ignore allegations in the underlying actions that  
 20 clearly establish the requisite potential for coverage that supports Atlantic Mutual’s duty to  
 21 defend Plantronics. In those actions, Plaintiffs allege that they suffered “bodily injury” in the  
 22 form of noise induced hearing loss from the use of Plantronics’ headsets. For example, the  
 23 *Schiller* complaint alleges that “noise induced hearing loss is the slow loss of hearing caused by  
 24 too much noise. Hearing loss happens when too much noise *hurts the hair cells in the inner*  
 25 *ear.*” *Schiller* complaint ¶ 13, attached as Ex. F to complaint (emphasis added). The same

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26 <sup>2</sup> Atlantic Mutual incorrectly cites the case as 6. Cal. 3d 287.

27 <sup>3</sup> The other underlying actions contain identical or similar allegations. See Compl., Exs. G-L.  
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1 complaint further alleges that “[t]here is no treatment, no medicine, no surgery, and no device  
 2 which can correct hearing once damaged by noise.” *Id.* The *Schiller* complaint also alleges that  
 3 Plantronics “risk[ed] the health and safety of millions of consumers,” that plaintiffs “have each  
 4 been directly and proximately injured by the conduct of” Plantronics and that they “have suffered  
 5 injury in fact” as a result of the alleged conduct of Plantronics. *Id.* ¶¶ 30, 47, 52. There is  
 6 likewise no question that the plaintiffs seek damages based on the facts alleged in their  
 7 complaints. *See, e.g., Schiller* complaint, ¶¶ 30, 34(i), 39, 55, 84 and prayer for relief. The six  
 8 other underlying actions contain comparable allegations. *See* Compl., Exs. G-L. Thus, in  
 9 simple, straightforward terms, these actions allege that Plantronics caused the plaintiffs bodily  
 10 injury because sound from its headsets hurt the hair cells in their inner ears, which resulted in  
 11 noise induced hearing loss.

12 Moreover, a third-party plaintiff’s strategic choice—to disclaim seeking certain damages  
 13 in order to facilitate certification of a class—does not change the essential facts alleged in the  
 14 complaint.<sup>4</sup> As the courts have stated, “as a matter of policy, however, the insurer cannot avoid  
 15 coverage simply because the complainant seeks a tactical advantage in the lawsuit. . . . A mere  
 16 statement by the complainant that he does not intend to make such a claim is insufficient to  
 17 establish as a matter of law that such a claim does not exist.” *Dobrin v. Allstate Insurance Co.*,  
 18 897 F. Supp. 442, 444 (C.D. Cal. 1995). Notwithstanding the third-party plaintiffs’ purported  
 19 disclaimer, the *facts* alleged in the complaint describe “bodily injury” and the third-party  
 20 plaintiffs seek recovery of damages based on those facts. Moreover, the third-party plaintiffs  
 21 could amend their complaints at any time. *See, e.g., Gray v. Zurich Insurance Company*, 65 Cal.  
 22 2d 263, 276 (1966) (“Defendant cannot construct a formal fortress of the third party’s pleadings  
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24 <sup>4</sup> Atlantic Mutual argues, without any supporting citation, that “Plantronics does not dispute  
 25 the fact that the class action plaintiffs are suing it for economic damages and repair and  
 26 replacement of the Bluetooth Headsets and have disavowed any claims for bodily injury.”  
 27 Opp. at 4. Plantronics has never conceded this. To the contrary, a third-party plaintiff’s  
 28 tactical choice to (presently) disclaim seeking certain damages, does not change the nature of  
 the suit as one for bodily injury. *See, e.g., Vandenberg v. Superior Court*, 21 Cal. 4th 815,  
 840 (1999) (“Predicating coverage upon an injured party’s choice of remedy or the form of  
 action sought is not [California] law.”)

1 and retreat behind its walls. The pleadings are malleable, changeable and amendable.”); *see also*  
 2 *Armstrong v. Davis*, 275 F.3d 849, 878 n. 40 (9th Cir. 2001) (“an amended pleading supersedes  
 3 the original.”) It is unclear what plaintiffs will allege if their tactical disclaimer is unsuccessful  
 4 and class certification is nevertheless denied. If that should occur, it would presumably obviate  
 5 the third-party plaintiffs’ incentive to disclaim personal injury damages and provide the contrary  
 6 incentive to recover bodily injury damages based on the facts alleged in the complaints. Such  
 7 extrinsic facts may provide additional grounds for coverage under the policy. *See, e.g., Horace*  
 8 *Mann Insurance Company v. Barbara B.*, 4 Cal. 4th 1076, 1081 (1993) (“Facts extrinsic to the  
 9 complaint also give rise to a duty to defend when they reveal a possibility that the claim may be  
 10 covered by the policy.”)

11 This illustrates why an insured should not be required to fight a “two-front war” against  
 12 third-party plaintiffs and its insurers at the same time. *See, e.g., David Kleis, Inc. v. Superior*  
 13 *Court*, 1035, 1044 (1995) (a “stay of a declaratory relief action to determine coverage is often in  
 14 order when the coverage question turns on facts to be litigated in the underlying third party  
 15 action”); *California Insurance Guarantee Association v. Superior Court*, 231 Cal. App. 3d 1617,  
 16 1628 (1991) (“[w]here, as here, the question of coverage turns upon one or more factual issues  
 17 which will necessarily be resolved in the underlying action, then it was entirely appropriate for  
 18 the trial court to stay the declaratory relief action pending resolution of those issues.”)<sup>5</sup> In  
 19 addition to litigation in the underlying actions over the harm allegedly caused by the Bluetooth  
 20 Headsets, the issue of indemnification is dependent on the evolution of the underlying litigation.  
 21 Plantronics is entitled to the benefit of factual development in the underlying actions—including  
 22 the development of the third-party allegations of bodily injury—without having its insurer

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 25 <sup>5</sup> Atlantic Mutual attempts to distinguish *California Insurance Guarantee Association* by  
 26 arguing that here, there is no common issue of fact between the underlying class action  
 27 lawsuits and the “purely legal question of whether Atlantic Mutual has a duty to defend or  
 28 indemnify its insured. . . .” Opp. at 4. As discussed above, issues of coverage are related to  
 factual development in the underlying actions, including the development of third-party  
 allegations of bodily injury.

1 attempt to capitalize on the third-party plaintiffs' (perhaps temporary) tactical choices to escape  
 2 its obligations under the policies.

3 **B. ATLANTIC MUTUAL DOES NOT ARGUE THAT IT WOULD BE**  
 4 **PREJUDICED BY A STAY**

5 As set forth in Plantronics' motion, Atlantic Mutual will not suffer any prejudice if this  
 6 case is temporarily stayed until the underlying actions are resolved. *See* Mot. at 5. No discovery  
 7 has occurred, and the parties have not begun their meetings and exchanges required by Rule  
 8 26(f) of the Federal Rules of Civil Procedure. In its opposition, Atlantic Mutual does not even  
 9 attempt to argue that it would be prejudiced by a stay. The absence of any prejudice on the part  
 10 of Atlantic Mutual weighs heavily in favor of staying these proceedings.

11 **III. CONCLUSION**

12 For the foregoing reasons, Plantronics respectfully requests that this Court stay the instant  
 13 case until the underlying actions are resolved.

14 Dated: March 4, 2008

Respectfully submitted,

LATHAM & WATKINS LLP  
 Stephen Stublarec  
 Paul T. Llewellyn

17 By:                     /s/                      
 18 Paul T. Llewellyn  
 19 Attorneys for Plaintiff  
 20 Plantronics, Inc.